INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
The questions are substantial	9
Conclusion	17

CITATIONS

Cases:

Dixie Carriers, Inc. v. *United States*, 351 U.S. 56 — 2

Interstate Commerce Commission v. *Jersey City*, 322 U.S. 503 — 11

United States v. *Detroit Navigation Co.*, 326 U.S. 236 — 11

United States v. *Drum*, 368 U.S. 370 — 2

United States v. *Pierce Auto Freight Lines*, 327 U.S. 515 — 11, 12

Statutes:

Administrative Procedure Act, Section 10, 5 U.S.C. 1009 — 3

Interstate Commerce Act:

National Transportation Policy, 49 U.S.C. preceding Sections 1, 301, 901, 1001 — 3

Section 1(18)(49 U.S.C. 1 (18)) — 3, 4

Section 5(2)(49 U.S.C. 5(2)) — 3, 4

786-488—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (J.S. App. A, 1a–49a) [1] is reported at 241 F. Supp. 974. The reports of the Interstate Commerce Commission (J.S. App. C, D and E, 52a–140a) are printed at 307 I.C.C. 493, 312 I.C.C. 277, and 317 I.C.C. 502. The final order of the Commission (J.S. App. F., 141a–142a) is unprinted.

[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Illinois Central Railroad Company, *et al.*

JURISDICTION

This was a proceeding to set aside orders of the Interstate Commerce Commission. 28 U.S.C. 1336, 2284, 2321–2325. The final judgment of the district court was entered on April 30, 1965 (J.S. App. B, 50a–51a). The notice of appeal was filed on June 29, 1965, by the United States and the Interstate Commerce Commission. On August 27, 1965, the time for docketing an appeal to this Court was extended to and including September 8, 1965. The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *United States* v. *Drum,* 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56.

QUESTIONS PRESENTED

The completion of the St. Lawrence Seaway is expected to bring a great increase in ocean-going freight to the Great Lakes ports. Chicago, the largest city on the Great Lakes, created the Chicago Regional Port District to build a new harbor to serve this traffic. The District built docks, and also railroad trackage and switching facilities to enable adequate railroad service to and from the docks. Two railroads were already operating in the area. Seven others applied for authorization from the Interstate Commerce Commission to serve the District. The questions presented are:

1. Whether, in light of the projected vast increase in railroad traffic to and from the Chicago Regional Port District, the Commission's determination that a certificate of public convenience and necessity should be

granted the applicants to enable them to extend their operations to the District was supported by substantial evidence.

2. Whether the Commission denied due process of law to the intervenors (the two railroads opposing increased service to the District) when, without an additional hearing, the Commission approved an immaterial change in the final lease agreements between the applicants and the District.

3. Whether, assuming *arguendo* that such an additional hearing should have been held, the court below erred in requiring a complete new hearing on all questions material to the operations of the applicants up to and within the District.

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901, and 1001), Sections 1(18) and 5(2) of the Interstate Commerce Act (49 U.S.C. 1(18) and 5(2)), and Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) are set forth in Appendix G of the Jurisdictional Statement filed by the Illinois Central Railroad Company, *et al.*

STATEMENT

The Chicago Regional Port District (a municipal corporation) was created by the State of Illinois in 1951 in order to develop Lake Calumet Harbor Port into a major deep-water port facility for import-export traffic via the St. Lawrence Seaway and the handling and warehousing of domestic shipments. The Harbor Port is a public facility open to all truck-

ing companies, barge lines and steamship operators. Although the Port District in 1954 had, by resolution, declared that the public interest and the success of the Harbor Port would best be served by making its trackage and switching facilities available to all accessible railroads, and despite the number of rail carriers operating in close proximity to the Harbor Port, by late 1956 only one road, appellee Chicago, Rock Island and Pacific (Rock Island), connected with the port's trackage at its west side. Appellee New York, Chicago and St. Louis Railroad (the "Nickel Plate")[2] was the nearest railroad on the port's then undeveloped east side.

In October 1956, seven railroads submitted applications to the Interstate Commerce Commission for approval of their joint plan to provide service to the port facilities on an equal basis.[3] The applications were supported by the Port District, the Chicago Board of Trade, and the United States Department of Agri-

[2] The Nickel Plate was merged into the Norfolk and Western Railway Company while the case was pending in the court below.

[3] Two of the applicants (Illinois Central Railway Company and the Pennsylvania Railroad Company) sought authority under Section 1(18) of the Interstate Commerce Act to construct a line to connect with the Port District tracks. The remaining carriers (Chicago South Shore and South Bend Railroad, Belt Railway Company of Chicago, Michigan Central Railroad Company, New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company) requested, pursuant to Section 5(2), the Commission's approval for access over the new line.

culture, among others, and were opposed by the Rock Island and the Nickel Plate. After a full hearing, the Commission found that there was a need for the proposed service and approved the applications to provide service to the Port District. The Commission did not find that the Rock Island had failed to provide adequate service but based its decision, rather, on the ground that the potential increase in future traffic at the port, primarily from the St. Lawrence Seaway made it "imperative * * * that at the very beginning of this new era of development a plan and system for handling the transportation needs of the port be established which will assure the type of service that is expected and will provide for steady progress and expansion" (J.S. App. C, 87a). The Commission concluded that approval of the application (J.S. App. C, 104a–105a):

> would result in greater rail competition, better service, greater car supply, and lower rates for the industries on Port District property at Lake Calumet Harbor. * * *
>
> The time has come when additional rail service at the port is required for the future development of the industries now or hereafter to be located there. Better service to shippers and receivers of freight through the elimination of delays, by providing single-line hauls, or more direct hauls, is clearly in the public interest. It would be a detriment and hindrance to the full and complete development of Lake Calumet Harbor if it were limited to the service of a

> single trunkline railroad when so many adjacent railroads are available and anxious to serve the port. * * *

Accordingly, the Commission found that the public convenience and necessity required construction of new tracks up to the Port District (J.S. App. C, 109a).

The Commission had also received evidence of the applicants' plan for operating *within* the port, as set forth in proposed joint facility and lease agreements between the carriers and the Port District, and found the plan "a common operating practice," one that was "economical as well as practical" and would "provide profitable operations for the applicants" (J.S. App. C, 76a, 81a). The applicants had not, however, sought specific authority to operate within the port over Port District tracks, on the assumption that Commission approval was not required (J.S. App. C, 60a). The Commission held otherwise; accordingly, in April 1960 the railroads filed supplemental applications for authority to operate within the Port District. The Rock Island and the Nickel Plate requested an additional hearing, but the Commission denied the request, noting that (1) the proposed agreements covering operations within the port had already been considered, in the Commission's prior report, (2) a need for the service had already been found, and (3) the supplemental applications merely corrected a "technical deficiency" (J.S. App.

D, 122a).[4] The Commission stated, however, that if any changes were made in the lease agreement upon execution, further approval would be necessary (J.S. App. D, 125a).

In June 1961 the applicants and the Port District executed a lease agreement which modified some of the terms of the proposed agreement previously approved by the Commission. The principal change in the final contract related to the basis for calculating the annual rent. The proposed lease had based the rental on 5% of an agreed valuation of the Port District rail facilities, in an amount not to exceed the equivalent of $2 per car, loaded or empty, including locomotives. The executed lease provided for a flat charge of $2 for each revenue car (*i.e.*, loaded freight car).

After observing that the other changes were generally "desirable," the Commission approved the modified agreement without a hearing as again requested by the Rock Island and Nickel Plate, because (J.S. App. E, 134a):

> We do not agree with the interveners that lack of information concerning the future value of the tracks or the volume of traffic anticipated

[4] In its first report the Commission objected to a provision in the lease which required the Port District to obtain the approval of the applicant carriers before permitting additional rail service over its tracks. A revised tentative lease agreement was thereupon submitted which deleted that provision; the other terms of the lease were identical to those submitted at the hearing (J.S. App. D, 124a).

786-488—65——2

> thereover bars approval of the modified agreement. We have never adopted any exclusive formula for determining the reasonableness of proposed rentals for railroad trackage. We believe that rentals generally may be considered reasonable where, as here, the facts of record disclose that nonaffiliated parties, after bargaining at arm's length, have entered into an agreement under which increased service will be offered to the public, all parties to the agreement will benefit financially, and the interveners' ability to continue to serve the public will not be impaired.

Accordingly, the Commission refused to "revisit upon the applicants and other parties to the proceeding the additional time and expense of a hearing upon the modified agreement" (J.S. App. E, 132a).

The Nickel Plate and Rock Island filed suit in the court below to set aside the Commission's grants of authority. The court held that the evidence was insufficient to sustain the initial order of the Commission authorizing the applicants to provide service up to the boundary of the Port District, and that the plaintiffs had been denied due process of law when the Commission approved, without further hearing, the supplemental applications seeking authority to operate within the District. The district court vacated the orders and remanded the proceedings to the Commission for a rehearing on "all of the issues" (J.S. App. A, 19a). Circuit Judge Edwards dissented on the ground that there was "substantial evidence" in support of the Commission orders granting the appli-

cants' certificates of convenience and necessity to operate up to and within the Port District (J.S. App. A, 44a). He believed that the proceeding should be remanded to the Commission for a hearing limited to the fairness of the lease agreement finally executed.

THE QUESTIONS ARE SUBSTANTIAL

This case is of great importance to the shippers and receivers of freight at Lake Calumet Harbor, to the major industrial and grain-producing areas that the port is designed to serve, to the developers of the port, and to the nine railroads involved. The port is the "major deepwater port facility of the port of Chicago," which is the "major Great Lakes general cargo port insofar as export and import shipments are concerned," and the Commission noted that it "presents one of the greatest potentials for the generation of traffic in the midcontinent area of the United States" (J.S. App. C, 84a, 85a). The Commission concluded that the public would benefit by the authority granted the applicants to serve the Port District because they would provide greater rail competition, better service, greater car supply and lower rates to the users of the port. It held that additional service was necessary at the outset of the port's development to assure its future growth and success (J.S. App. C, 104a). The district court's judgment deprives the public of these important benefits. Further, we submit that the court's decision is erroneous and, indeed, reflects a radical and unjustified departure from accepted standards of judicial review of administrative action.

1. The court below erred in holding that the evidence in the record before the Commission was insufficient to support the conclusion that the public convenience and necessity require that the applicant railroads be permitted to service the port facilities (J.S. App. A, 18a). The Commission found that added rail service was required for the future development of industries located on Port District property and that it "would be a detriment and hindrance to the full and complete development of Lake Calumet Harbor if it were limited to the service of a single trunkline railroad when so many adjacent railroads are available and anxious to serve the port" (J.S. App. C, 104a–105a). And the court below found "substantial support in this record" for the Commission's "important findings" (J.S. App. A, 7a). It thus agreed with the Commission that prospects for greatly increased traffic via the St. Lawrence Seaway necessitates a substantially broadened railroad service into and out of the Lake Calumet port; that the applicants' proposed route into the port would be more direct, entail less handling, and be less expensive because of the elimination of the switching charges now absorbed on line-haul traffic; that it is imperative that a plan for handling the transportation needs of the port be established now, to provide for steady progress and expansion; and that "competition for shipper benefit" is one of the factors to be considered by the Commission in granting authority to extend rail service (J.S. App. A, 7a–9a, 14a).

With those determinations, the district court exhausted its reviewing function. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 513.

Having made all the findings that were necessary and sufficient to uphold the Commission's order, the district court inexplicably concluded that the Commission's order must be reversed because "this record does not offer ample support in fact and law for the conclusions" of the Commission (J.S. App. A, 13a). The conclusory finding that the record does not contain "ample support" for the Commission's conclusions misconceives the proper scope of judicial review of administrative action. To sustain a Commission determination, the court need only find "substantial evidence." It need not find "ample support"; and a lack of ample support is not fatal so long as substantial evidence is found. In any event, the court gave no explanation whatever for its result. It pointed to no finding or conclusion of the Commission with which it disagreed. Its reversal of the Commission's order was, thus, arbitrary and a clear departure from the proper scope of judicial review of orders of the Interstate Commerce Commission; the reviewing court has no authority to substitute its judgment for that of the Commission. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535–536; *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241.

2. The district court was also incorrect in holding that the Commission's refusal to provide a rehearing for the Rock Island and Nickel Plate, concerning the

modified lease agreement "by which they were bound, constituted a denial to them of due process of law" (J.S. App. A, 19a). This Court has held that whether or not a further hearing is to be granted or denied is a question committed to the Commission's discretion, and that "only a showing of the clearest abuse" of that discretion warrants reversal of the Commission's refusal. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535.

The court below observed that the applicant railroads had submitted their tentative joint facility and lease agreements at the hearing and that their "witnesses were cross-examined by intervenors in relation to it" (J.S. App. A, 6a). The Commission's first report favorably discussed the applicants' proposed operations within the Port under the tentative agreements, but did not formally approve them, since technically the applicants had not requested authority to operate within, as well as up to, the District. After the carriers submitted their amended applications, the Commission found the proposed lease agreement "reasonable and adequate to accomplish the purpose for which it is intended" (J.S. App. D, 125a).

The lease agreement finally executed was in most respects identical to the proposed agreement considered at the hearing and in the first report of the Commission. The only change complained of by the Rock Island and the Nickel Plate was that the final lease agreement[5] prescribed a different formula for

[5] They do not complain of any provision in the joint facility agreement (see pp. 14–15, *infra*).

determining the rent payable to the Port District.[6] The district court held that without the additional hearing requested by the intervenors, the record was deficient because, in the court's view, "the rental provisions under the final plan differ materially from the rental provisions under the plan originally proposed" (J.S. App. A, 18a). The court apparently was concerned that the new rates might be so high as to render the entire operation unprofitable (J.S. App. A, 18a). But the Commission had initially approved as reasonable the proposed agreement fixing a maximum charge of $2 per car, loaded or empty, and while the final agreement called for a flat charge of $2 for revenue cars only, that amount is no more than the maximum originally approved by the Commission.[7] Accordingly, the rate change did not adversely affect either the applicants or the intervenors and a further

---

[6] The other changes in the final agreement were clearly insubstantial and were not discussed by the court below. The Commission noted that the changes "are, for the most part, desirable in that they reword and rearrange the lease agreement to comply with State property laws; show that the agreement is not intended to apply to industry-owned tracks, affect the rights heretofore held by Rock Island, or grant the applicants any exclusive privileges in the Port District's property; and otherwise define more clearly the rights and responsibilities of the parties" (J.S. App. E, 137a).

[7] The original lease provided for an annual rental based on 5% of an agreed valuation of the Port District rail facilities provided that the total rental should not exceed the equivalent of $2 per car, loaded or empty. Since the parties never agreed on the value of the facilities, it is impossible to determine whether the applicants might have paid less rent under the lease tentatively proposed. Clearly they would not pay a larger amount under the final contract than the maximum payable under the

hearing on the rental provisions of the final lease was therefore unnecessary.

Moreover, contrary to the court below, neither the Rock Island nor the Nickel Plate is "bound" by the modified agreement between the Port District and the applicant carriers. The Rock Island and the Nickel Plate were not parties to the contract, and they are free, subject to Commission approval, to enter into separate arrangements with the Port District.[1] Thus they have no standing to complain of prejudice to those carriers that are parties to the lease agreement in this case. Nor is there any basis for a contention that a hearing was required on the question whether execution of the joint facility agreement would prejudice the operations of the Rock Island and Nickel Plate within the District. For this issue was fully developed at the original Commission hearing. Appellees then urged that the proposed plan for operating in the harbor area would create delays and congestions (J.S. App. C, 81a-82a). The Commission rejected these allegations, observing that the "method proposed * * * is the same as used in other similar areas. It is a common operating practice and is economical as well as practical. The joint-facility plan has many advantages, in that thhe switching op-

earlier agreement, and as the Commission noted, it is likely that they would pay less because of the "elimination in the modified agreement of the * * * charges for locomotives and empty cars using the tracks" (J.S. App. E, 134a).

[1] The Rock Island operates at present under a separate agreement with the Port District, one that has never been submitted to the Commission for approval.

erations required on the part of all the railroads within the port may be coordinated and performed by a joint switch engine * * *" (J.S. App. C, 81a). The joint facility agreement finally executed was identical to the one considered at the hearing, and the Rock Island and Nickel Plate do not now complain that they will be prejudiced by any provisions in that agreement.

The Commission, throughout this proceeding, accorded the right to be heard to all who might be affected by Commission action. However, the need for flexibility in administrative proceedings, especially proceedings as complex and protracted as this one, where the public interest clearly requires a prompt decision on additional railroad service for the rapidly expanding Great Lakes traffic, justified the Commission in terminating the hearing process when the essentials of the applicants' operations in the Port District were determined and only details remained to be settled. No substantial rights of the appellees were prejudiced by this effort to streamline and expedite the proceeding, and the appellees' contention that they are entitled to a further hearing seems merely a delaying tactic. The one change of any significance that was made in the lease agreement after the hearing (as noted above, appellees do not complain of the terms of the joint facility agreement) was that the rent which the applicants were to pay the Port District for use of its trackage might be somewhat higher than originally agreed. The fact that their prospective competitors may be paying

higher rent for these facilities should benefit, not harm, the appellees. They are free to negotiate their own agreements with the Port District, and one of them has. Should the result of the higher rent be to make the operations of the applicants unprofitable, as the district court feared, that, too, would benefit, not harm the appellees: they might achieve their ultimate objective in this proceeding, which is to enjoy an exclusive position in the furnishing of railroad service to the burgeoning Port District, free of any competition from other railroads. In the circumstances, we submit that the claim of a denial of due process of law is without substance.

3. Should this Court, however, determine that an additional hearing is necessary, we submit that the district court erred in requiring a "complete rehearing * * * upon all of the issues" (J.S. App. A, 19a). We agree with Judge Edwards that such a rehearing should be for the "limited" purpose of considering the fairness of the rental charges and other changes in the lease and should "exclude * * * the basic convenience and necessity issues," since, as to this "most important" phase, "there has been a thorough hearing and fair consideration" (J.S. App. A, 49a). The complete reopening of the case and rehearing ordered by the district court would serve no purpose other than to delay further the additional service found necessary in the public interest.

CONCLUSION

This appeal presents substantial questions of public importance. Probable jurisdiction should be noted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

LIONEL KESTENBAUM,
JERRY Z. PRUZANSKY,
Attorneys

ROBERT W. GINNANE,
General Counsel,

ROBERT S. BURK,
Attorney,
Interstate Commerce Commission.

SEPTEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965